UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-01789-smb

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SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

Defendants.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 8, 2018

2:05 PM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

ECRO: SHEA H.

HEARING re Trustee's Motion for an Order Authorizing Limited Discovery on Good Faith Issue pursuant to Fed. R. Civ. P. 26(d)(l) (Adv. Pro. Nos. 10-04287; 10-04330; 10-04457; 10-04471; 10-05120; 10-05345; 10-05353; 10-05354; 10-05355; 12-01273; 12-01278; 12-01698; 12-01699 (SMB))

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P R O C E E D I N G S

THE COURT: Madoff.

MS. GRIFFIN: Good afternoon, Your Honor. Regina Griffin, BakerHostetler, counsel for the Trustee.

THE COURT: Good afternoon.

MR. SIMON: Good afternoon, Your Honor. Howard Simons from Windels Marx, also for the Trustee.

MR. BOCCUZZI: Good afternoon, Your Honor. Carmine Boccuzzi, Cleary Gottlieb Steen & Hamilton, for Citibank. And with me is my colleague, Pascale Bibi.

THE COURT: Okay.

MS. GRIFFIN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. GRIFFIN: Your Honor, the Trustee respectfully submits that good causes exists for the discovery sought for the reasons we put forth in our papers. To sum it up very, very succinctly, Your Honor. The good cause --

THE COURT: Go ahead.

MS. GRIFFIN: The good cause that we are relying upon is the intervening change in law with respect to the good faith defense that took place after the Trustee filed the claims at issue.

But also, Your Honor, it has to do with the fact that we are dealing here not with your typical case under the Federal Rules, but with a Bankruptcy Trustee who is

given by Congress the express powers for pre-Complaint discovery under Rule 2004.

THE COURT: Okay. And you took it, right?

MS. GRIFFIN: Yes, Your Honor. But, of course, we took it at the time. Basically, we did everything we needed to do to plead to the law that existed at that time.

THE COURT: I saw a lot of questions though in the 2004 discovery relating to the legality of BLMIS and the due diligence conducted by the Defendants. So what more could you have asked for?

MS. GRIFFIN: Well, Your Honor, frankly, everything that we did at the time was guided -- and I just want to take you back. And everything in hindsight looks like you coulda, shoulda, woulda. But at the time, we had already had a decision by Judge Lifland; I think it was Picard v. Merkin. Also, I think Your Honor came out with a decision shortly thereafter that the typical procedure here was that the Court wouldn't even consider a motion to dismiss on the good faith defense.

Once the Trustee using those broad investigative powers to investigate, as you know, thousands of lawsuits, thousands of claims; once we had enough to plead what we needed to plead, we didn't want to bring before the Court unnecessary discovery disputes and compel them.

And by the way, we worked with the Defendants to

narrow the scope, as we should. At the time, all we had to do was basically identify the Defendants who received subsequent transfers from initial transferees and with specificity the transfers that they received.

And so, while we had gotten more information from certain Defendants, once we had enough with that, we weren't going to engage in a protracted battle, particularly given the contracted time period in which to conduct all of that investigation and file all those lawsuits. And so, I'm sorry --

THE COURT: I'm sorry, go ahead. I had a more general question.

MS. GRIFFIN: I'm happy to --

THE COURT: All right. Getting back to facts of this case, under what circumstances should a Plaintiff who can't plead a plausible claim be allowed to take discovery in order to be able to plead a plausible claim?

MS. GRIFFIN: Your Honor, in a situation, I would throw this question back at you. If we were in the 2004 time period and the law had changed, we would have good cause to bring the discovery demands we've sought for the information that we're asking for right now, because now, it's necessary to plead a cause of action.

And, Your Honor, I think I read In Re. Sun Edison said that good cause under 2004 exists where you see --

THE COURT: We're past 2004.

MS. GRIFFIN: Right.

THE COURT: And I'm not necessarily limiting my question to a bankruptcy case where a Trustee or somebody has 2004 powers.

But just as a general question: I'm a Plaintiff. I can't plead a plausible cause of action or my cause of action just been dismissed because it's legally insufficient. Are you saying that a Plaintiff in that situation should always be given the opportunity to take discovery in order to plead a plausible cause of action?

And if not, what are the circumstances generally under which a Plaintiff should be able to take discovery, merits-based discoveries, in order to plead a plausible cause of action?

MS. GRIFFIN: I think, Your Honor, it's the -- in order to plead a cause of action. All of the instances that you're talking about, the cases that you will see, are going to be cases where the parties were parties to the transactions at issue.

And so, what we're saying is that there is no bright-line rule that say cannot take merits discovery. 26(d) gives you the discretion, it's in your sound discretion under the circumstances.

THE COURT: I assume it's an exception that

swallows the rule.

MS. GRIFFIN: The norm -- you're absolutely right, Your Honor. The norm typically is to proceed in that manner. But even in cases that the Defendants cite to themselves and which we cite to, the Court allowed discovery, even in the face of a motion to dismiss, where the justifications of good cause existed under all the factors that went forward.

And yes, in some of those instances, it involved preliminary injunctions. But the point is is good cause exists for relief all of the time where there's an intervening change in law. And so, there's no bright -- there's no bright-line rule that you can't --

THE COURT: Let me interrupt you.

MS. GRIFFIN: Sure.

THE COURT: If you were filing the Complaint today as a normal litigant, the intervening change of law wouldn't matter. So if you couldn't assert a viable cause of action today, under what circumstances could you take merit-based discovery in order to be able to assert a plausible cause of action?

MS. GRIFFIN: I guess, Your Honor, are you talking about a bankruptcy to --

THE COURT: Because it sounds like you may be arguing an exception that's law of the rule.

MS. GRIFFIN: I don't, Your Honor. I think this is the -- this is one of those unusual circumstances.

THE COURT: Okay. Tell me what the facts are in this case that make it unusual.

MS. GRIFFIN: Sure. The unusual facts of this case, Your Honor, is we are a Bankruptcy Trustee who would typically have Rule 2004 powers. Because of the pending proceeding rule, those powers generally cease, as a general rule -- again, that's what the case law says -- because the Courts want to make sure that the parties that are the target of that Rule 2004 discovery would have the protections of the Federal Rules of Civil Procedure.

Here, we're in a paradox, Your Honor, that if we were in 2004 right now, we would be able to seek this discovery. But because we're not, the Trustee is pleading to a new standard; not just has a pleading burden, but he has a new standard of subjective willful blindness where he has to know what the turning away was, the internal decision powers.

And all this Trustee is asking for, Your Honor, is this -- in this limited circumstance, this is a very limited circumstance where there's been an intervening change in law, he merely wants to be on the same footing as all Trustees going forward.

THE COURT: You know, I didn't read every one of

the Complaints, but every Complaint I read had an allegation that the Defendants willfully blinded themselves. So you must have had a factual basis under Rule 9 or 11 to make that assertion.

MS. GRIFFIN: Sure. I mean, Your Honor, all the facts that are in there talk about how the inquiry notice standards exists, what they knew or should have known under the circumstances.

And so, Your Honor, the facts are what bear it all out. And all we are saying is that we are seeking just to have the opportunity to know from the Defendants, many of whom acknowledge they have not produced any documents whatsoever, what that turning away is. So that's pretty much what we're talking about.

THE COURT: All right. I still don't understand how Rule 2004 makes this case special. It sounds like it makes it worse, only because usually, it doesn't have the right to take any kind of discovery.

MS. GRIFFIN: Well, I think, Your Honor, that the way you pose the question is is why is this different? This is different because every other litigant comes to it as a participant in their own transactions. Congress anticipated that we would have -- the Trustee would have a right to investigate. And without the documents of the Defendants, that's what we need to be able to --

THE COURT: But you didn't transact with the subsequent transferees; you have nothing to do with them.

MS. GRIFFIN: Well, I guess, in most instances, that's right, Your Honor, although some of them might think you did have something.

THE COURT: And in every commercial dispute, you don't necessarily interact with the party you're suing.

MS. GRIFFIN: I can't argue with that statement, Your Honor.

THE COURT: All right.

MS. GRIFFIN: But in this circumstance, we're just in a situation that I think you recognize. Every other Trustee knows that they're going to take expansive, very detailed information about why parties did what they did with respect to their Madoff-connected transactions. Whereas, we're not asking for depositions; we're asking for very limited document discovery. And there's no prohibition. That rule is in place to allow you to use your discretion in places where it seems appropriate and justice will result.

THE COURT: Can I ask another question?

MS. GRIFFIN: Of course.

THE COURT: Do you think that in a case like this where you took all this 2004 discovery, and in many cases, asked for the specific discovery that you're now seeking

that the equities lie with you?

MS. GRIFFIN: Your Honor, at the time -- again, I know that I'm going to sound like I'm repeating myself. But, but --

THE COURT: I do it all the time.

MS. GRIFFIN: Essentially, Your Honor, every decision we made at the time, we asked for it as time was encroaching on us with the deadlines.

To take to Judge Lifland at the time a dispute that we had where our parties said, I'm not answering any of your document demands or I'll answer them, but for this little part, when we didn't need to use that to state a claim; that's what the good cause was under Rule 2004.

Why would we take every dispute for discovery when the normal course, as Your Honor has ruled, is that we won't even hear that motion to dismiss on the good faith defense until after discovery has proceeded because it's such an issue of fact intensive decision.

THE COURT: You say that you didn't have to plead it, but you did plead it. Every Complaint they knew or should have known, which includes knew.

MS. GRIFFIN: Right.

THE COURT: And every Complaint pleads willful blindness.

MS. GRIFFIN: Well, I mean, those are the words

that are used. But as Your Honor knows, every single --

THE COURT: Why'd you plead it?

MS. GRIFFIN: Because every single fact turns on this case. And by the way, Your Honor, every -- I think every lawyer in this room is always going to want to use the words that the Court has described the test is that governs their case. That is not -- it's not just, hey, that was the law that existed at the time. Judge Lifland had ruled that what we did was exactly what we needed to do at the time to plead our cause of action.

This is not a situation where we just -- we made -- we made no efforts to do anything when we should have. And as a matter of fact, I think the restraint, the working with counsel, the not bringing discovery disputes before the Court shows that --

THE COURT: Like this dispute.

MS. GRIFFIN: I would call this an intervening change in law dispute, Your Honor. And by the way, all of those cases that we cite in our reply brief? All of those are instances where the Court has said, you're right, good cause exists to reopen discovery deadlines, good cause exists to even permit a motion for reconsideration.

It's not a parsing of what you did in the past; it's a moving forward based on what you know right now. And what we know right now is that we need to plead to this new

standard, and it's a new standard and a new pleading burden. And so, those are the two things that have changed, and we're simply just being asked to be given the same opportunity. And we respectfully submit that good cause exists.

THE COURT: Thank you.

MS. GRIFFIN: Okay.

MR. BOCCUZZI: Good afternoon, Your Honor. Carmine Boccuzzi. I'll be presenting the arguments for the transferee defendants, and there are some other lawyers on the defense side here in case there's a specific issue --

THE COURT: Okay.

MR. BOCCUZZI: -- in case Your Honor wants to raise. The change in law argument, which is really what the Trustee bases their whole motion here today on is really a red herring.

As Your Honor identified, the state of mind of these transferee defendants has always been a central issue in this case and was a subject of the Rule 2004 discovery that was served by these folks back before they commenced their litigation; and on which they've gotten discovery from many of the people in this room, as well as untold numbers of other people.

It is in the record of this case, and we cite it in our brief, that they're sitting on millions of pages of

documents. And, importantly, most of the transferee defendants before Your Honor on this motion are secondary transferees where the primary transferee was the subject of extensive discovery by these folks, including --

THE COURT: But that doesn't necessarily tell them anything about your state of mind.

MR. BOCCUZZI: Well, they have, for example, and they plead it in the Complaint against my client, emails and reported conversations between the primary and the second transferee.

THE COURT: Maybe they can survive a motion to dismiss, and the answer is to make the motion and then we'll see what happens.

MR. BOCCUZZI: Correct. We should be able to move this Complaint, or they want to amend their Complaint. And that's the paradigm that Judge Rakoff set forth in the extraterritoriality decision. He announced the rule about the extraterritorial reach of 550, and he said: Now, on remand, the Trustee shall, if he has the facts, plead them. It wasn't, oh, there's a change of law now; now you get full-blown merits discovery on the issue that you say you need full-blown merits discovery on.

And, Your Honor, that's exactly what they want, and that is exactly what 26(d) does not provide for. And just to be completely clear about that, if you look at the

document request they're putting forward here, they do it as one, two, three. Oh, only three document requests. Of course, there are bullet points; there are 10 document requests. For my client, they cover a period of nine and a half years; for other folks in this case, eight years, maybe longer. Those are just -- those are obviously very long time periods.

They've cleverly omitted the word all from the front of every one of their document demands, but it's clear that's what they want. And you need to look no further than Miss Griffin's reply declaration at Paragraph 6. In that declaration, she is saying that the production they got from Fortis was insufficient. And why was it insufficient? Quote, "This cannot conceivably encompass all documents related to an eight-year relationship between Fortis and Tremont." I think Tremont's the primary transferee in that case.

It's the feeder fund at issue in our litigation. But my point is, we're in 26(d) land now because they have filed. So they have rights under the Federal Rules of Civil Procedure and the transferee defendants have those rights.

THE COURT: So let me ask you the same question I asked Miss Griffin. Under what circumstances should a plaintiff be entitled to, you know, merits-based discovery in order to be able to plead a plausible claim?

MR. BOCCUZZI: You know, you just don't get that.

THE COURT: You're saying that under no circumstances do you get merit-based discovery.

MR. BOCCUZZI: I'm having a hard time thinking of examples. And I based it on two things, Your Honor: number one, the clear holding in Twombly and Iqbal, which explicitly talks about the gatekeeping function of the 12(b)(6). You got to nudge over the line of plausibility. And if we didn't have that, you're subjecting folks to the burdens of discovery on a claim that otherwise isn't going to survive. So I think that's in Twombly and Iqbal and the cases that have followed from that.

THE COURT: Have any of the preliminary injunction cases in which it's been granted permit merits-based discovery in order to show a likelihood of success on the merits?

MR. BOCCUZZI: It's an interesting question because I was going to the 26(d) context. Where, again, 26(d) is always talking about what is narrowly needed, and they're talking about things like, in one of the examples in the cases cited, I've got a bunch of foreign defendants and they're about to secrete assets out of the jurisdiction. And so, it's some focused discovery on, you know, some bank accounts, that kind of thing.

THE COURT: Well, that's not really merits-based

discovery; that's irreparable harm.

MR. BOCCUZZI: Right.

THE COURT: I'm talking more about where if someone seeks a preliminary injunction that says, but in order to show likelihood of success on the merits, I need some discovery. Are you aware of any cases that have granted that?

MR. BOCCUZZI: We cite a case from the District of Columbia, which was on behalf of handicapped folks suing the D.C. subway system. I can't remember the exact name of it. But there, I'm pretty sure it was denied, albeit -- and in the context of a preliminary injunction.

And usually -- and, again, it's nar- -- in all the cases from my memory of reading them, to the extent anyone ever would get some merits-based discovery, it's always in the PI situation -- or it would be there, which of course, we're not in -- and it's narrow. Because in that case that I'm recalling about the lawsuit against the subway system, the Court ends up denying a chunk of it saying, you're going too broad in terms of wanting to get what you're trying to get.

And the Attkisson case is another case that we cite, where, again, the view was that you're basically hunting for a claim and that's not what you do in the land of 26(d). And I think that is also how the issue played out

in the Mendelow case obviously in a case before Your Honor where there's --

THE COURT: Just settled though.

MR. BOCCUZZI: Okay. But it was -- but I think Your Honor there expressed a concern that there's looking -- using discovery to look to see if you've got enough is really not permitted.

THE COURT: I agree with you that under Twombly and Iqbal, you don't get discovery unless you can assert a plausible claim. But we also had this 26(d)(1) issue, which permits certain expedited discovery.

And that's why I asked the question, under what circumstances can you get it if you can't assert a plausible claim without it. You're telling me never. I guess Miss Griffin is saying sometimes and this is one of those sometimes.

MR. BOCCUZZI: Right. And I would say just to, since I got into the facts of that one case I talked about. I guess there are circumstances where it can happen, but it's very narrow, and the case law is insistent on that narrowness, which this -- none of this discovery is narrow.

And also, in those cases, it's in service to the concern about preliminary injunction and the issue of irrevocable injury, which, again, is not here. They've rejected going into the Notaro paradigm, right, which is the

standard that links Rule 26 to preliminary injunction and irrevocable injury to the more -- to the broader good cause standard.

THE COURT: Well, Judge Lynch thought that was not the correct standard, right?

MR. BOCCUZZI: Correct. No, I'm saying I --

THE COURT: And he's got a pretty good track record.

MR. BOCCUZZI: I think that's the case, that's the standard that's emerging as the right one. But all I'm saying is, they can't hang their hat now and say, well, this is like a preliminary injunction situation where I get a peek at the merits. Because, otherwise, I'm going to lose out on my ability to get a preliminary injunction and, therefore, may suffer irrevocable injury. That's not our paradigm.

THE COURT: Let me ask you another question. Is this simply a timing question? In other words, if I direct the parties to engage in a Rule 26(f) conference, then they can ask for whatever discovery they want, right?

MR. BOCCUZZI: I don't think so, Your Honor, because we're not -- we're in a situation where the Complaints that they have, they say they don't want to stand on them and they don't pass muster.

THE COURT: They do allege knew -- forget about

the should have known -- they allege knew and they allege willful blindness, so the issues are teed up. Why can't I just direct you to have a conference and then they'll serve their discovery?

MR. BOCCUZZI: I mean, I think that could only work, Your Honor, if then we say we're going to move against the Complaint, bring a motion to dismiss.

THE COURT: So you move; that doesn't stay discovery.

MR. BOCCUZZI: Excuse me?

THE COURT: If you make a motion, that doesn't necessarily stay discovery.

MR. BOCCUZZI: A motion doesn't necessarily stay discovery, but that's not what they want to do. They want to amend their Complaint. So they're saying, Your Honor, I don't have a Complaint that I believe can withstand a motion to dismiss. I want to amend the Complaint.

And, again, I haven't seen any cases where, in that context, the parties nevertheless proceed to discovery on a case that has been abandoned by the Plaintiff. So they're not saying, Your Honor, here we are --

THE COURT: That's a little strong. I do -- I do agree with you that there's a certain implication here that they can't assert a plausible claim without the discovery, but I may be wrong. Some, you know, every case is

different. I looked at a Complaints; it looked like they might have been whistleblowers in some of these cases, and that's a little different than just a plain red flags case.

MR. BOCCUZZI: So going back to you question.

THE COURT: Yeah.

MR. BOCCUZZI: Is it just a matter of timing? I don't think it's a matter of timing. I don't think they can proceed to 26(f). I think if they were to do that, then we would just now have a flip. Which is this was their motion to get discovery, we would need to make a motion to stay discovery. And I guess request that they put out a Complaint or do something, and we'd be back, I think, maybe with the mirror images of the issues we're dealing with today.

But I think the easy rubric, and the rubric they've handed us in the Court to consider this under, is 26(d). And under 26(d), I don't think they satisfy, if you look at the multifactor test -- and I agree the Court has discretion. But when all the factors points towards not giving the discovery that's requested, I think is very clear where the discretion must -- how it must be exercised.

THE COURT: Thank you.

MR. BOCCUZZI: Thank you, Your Honor.

THE COURT: I meant to ask you, Miss Griffin, the relationship between your motion to amend and your motion

for discovery because there's been no objection that I can see to the motion to amend.

MS. GRIFFIN: Sure, Your Honor. So at the time the good faith decision had come down, and then -- and we were actually preparing this very motion, and then the extraterritorial decision came down.

And what we were all trying to do was to do was to move to a point where we would -- we wanted to seek the discovery because of the new standards, but we also knew that we were going to need for leave to replead, and so, we wanted to be timely. We didn't want any -- there's in every lawsuit, there's always going to be a party that claims something.

And so, so what we did is we filed the motion for leave to amend, and then we had all the scheduling orders, Your Honor. And the whole point of it was the defendants came in and said, wait a minute, we're going to be out on extraterritorial grounds; we don't want to have to litigate the Trustee's issue.

I'm sorry, I can see you're not, Your Honor --

THE COURT: No. I was just, do you want to proceed and amend your Complaints, let's say, within 30 days and leave this issue unresolved? Of course, I reserve decision over whatever else.

MS. GRIFFIN: So --

THE COURT: Or you're saying it doesn't even pay because I can't assert a claim.

MS. GRIFFIN: We are absolutely not conceding under bad circumstances.

THE COURT: So why don't you just amend, and then we'll see if you survive a motion to dismiss.

MS. GRIFFIN: But, Your Honor, I guess the reason we wanted to ask for the discovery is because we think -- and, by the way, I do want to get to some of the case law. You asked the question and I'd like to respond to it.

THE COURT: Okay.

MS. GRIFFIN: But we're not conceding. There is new information that has come through in other places that we have negotiated; that the entire process was, look, we're going to want to put forth a new amended Complaint anyway in light of the new proceedings.

And so, what we were agreeing with the defendants were, let us at least have the discovery motion heard first. If the Court grants it, then you get one. If the doesn't grant the discovery, then we'll proffer our new amended Complaint and then the judge will decide all of the issues.

But let me back up. You raised the (d)(2) issue. When we made this issue back in 2014, (d)(2) didn't exist. It's that whole point of allowing the Court -- again, it's another flexible tool the Court can exercise to just allow

this to proceed, allow our discovery demands to be heard, and show that there's no need for a motion for a stay.

THE COURT: But my discovery has to be informed by something. I mean, my discretion has to be informed by something.

MS. GRIFFIN: Sure. So, Your Honor, again, I think good cause is found where there's an intervening change in law. I understand, I'd like to talk about a couple of the cases that are in case law.

I think it's a case we cite, 3M Company v. HSBC Bank. And in that case, it was a letter of credit case, and it was a situation where they were proceeding on a quick basis. But the Court did -- it was about basically was a letter of credit, you know, basically being fraudulently induced to be paid on.

And the Court did allow in that case, it was Judge Gardephe, allowed limited discovery to take place of HSBC; that goes to the very merits of the issue is the grounds under which the explanation is the reason of the right or lack thereof to demand such payment. So it went to the merits.

We cite to another case, Your Honor, OMG v. Fidelity. This is another situation where the Court was looking where there was a motion to dismiss pending, and it looked to all the factors. And there, they decided that the

Court brought it down to the issue, it comes down to the comparison of the potential prejudice will be suffered by the defendant if discovery is admitted, and that which will be experienced by the plaintiff if denied the opportunity for discovery at this stage.

And, again, Your Honor, all we're asking for is, in light of all the new changes, to be heard.

And there is one other case that I wasn't -- I didn't provide to the Defendants. It's just something that we found recently, but I'm happy to give it to counsel. It's the Quintero Trust case. It's 2009 Westlaw, 3381804.

It's an elder law case, in which basically the Court decided that predatory lending claims, in light of the accusations that plaintiffs are very senior and suffering from age-related infirmities, they basically said that the discovery -- he allowed the discovery to go forward basically to allow them to more fully respond to the pending motions to dismiss.

The only reason I bring it out, Your Honor, is there are instances where the Courts have said you can do this, there is no prohibition. Even in the cases they cite to the Court looks at all of the factors: the timing of the request, the need for the request, the scope of the request.

I'm not going to get into what everybody's produced. But suffice to say, Your Honor, that these

defendants are not retail customers. They're big banks, and they engaged, in many instances, in multiple Madoff transactions across business groups that crossed entities that crossed borders.

What we got from each of these defendants -- from Fortis, we got nothing from the defendant at issue; we got it from a third party, a nonparty Fortis entity that was a U.S. based entity. So what we got was slivers.

I don't want you to think that we are asking for duplicative. If they've produced everything, we don't -- we're not going to force it; that's a meet and confer conversation. If you've already produced it, we don't want it. We just want to sit down and start the dialogue.

Unless Your Honor has any further questions.

THE COURT: So do you want to hold off on amending the complaints until this issue is resolved?

MS. GRIFFIN: Your Honor, if Your Honor grants us the discovery, then it would give us a more fulsome and fair opportunity to present to you our best claims under these new standards.

THE COURT: So do you want to hold off on amending the complaint?

MS. GRIFFIN: Yes, I'd like to hold off until you decide, Your Honor.

THE COURT: Okay.

MR. BOCCUZZI: Your Honor?

THE COURT: Yes.

MR. BOCCUZZI: Just on the cases. The first two cases that Miss Griffin mentioned were both preliminary injunction cases.

THE COURT: 3M and OMG?

MR. BOCCUZZI: Yeah, exactly, Your Honor. And in OMG, the judge commented how the proposed document requests were, quote, "exceedingly pointed." And then obviously, I haven't read the Quintero case that was just mentioned. But, I mean, based on the description, it sounded like you had very old plaintiffs and there's probably the concern if they were going to pass away. Which obviously none of those -- none of these cases are on point or support what the Trustee wants to do here.

THE COURT: You haven't read it, but it's not on point.

MR. BOCCUZZI: Well, I'm not that old, Your Honor.

THE COURT: I am.

MS. GRIFFIN: I guess where I would respond to that, Your Honor, is it's an information inequity. That's what we're talking about, is those people are elderly and they're facing an information inequity, and that's precisely what we're talking about. And if you look in our moving papers, there is support for the notion that in a situation

where you don't have that information because especially you're a Trustee who has to investigate everything.

THE COURT: That whole Trustee argument cuts both ways because the Trustee gets a lot of information under Rule 2004 that a usual ordinary plaintiff doesn't get.

MS. GRIFFIN: Right. And that's why, Your Honor, we limited. Again, we're not asking for depositions. We're asking for limited documents, which we would need for their internal workings.

THE COURT: I'm not so sure they're so limited when you ask for every document related to initial investment and ongoing due diligence. That's --

MS. GRIFFIN: Your Honor, that is as an issue of there's --

THE COURT: Why did you just ask him for every document that related to BLMIS being a fraudulent activity or fraudulent company?

MS. GRIFFIN: There's a very simple request, and I think we would get baskets of very broad --

THE COURT: I saw it in some of the 2004 requests that's what you asked for.

MS. GRIFFIN: Your Honor, I think what we're talking about can take place. The narrowing of the request can take place at a meet and confer. The -- and any lessening of where they're looking for it; that can all take

place.

But using it as a grounds for saying you shouldn't get it at all; that's not it. We tried to be narrow. But what we've experienced -- and these are complex cases that involve feeder funds and financial institutional negotiating really complex swaps and derivatives cases. It takes a lot to figure out.

And so, to say that one email or one due diligence analysis, we don't know what we're asking for. We're not in possession of it. What we did is we took what we've seen elsewhere and tried to tailor our request to what we think might exist.

And it's a conversation, Your Honor, that most of these banks have a due diligence arm. They have a credit committee. You can find -- they can figure out very quickly who's going to have the information. There are going to be key players that have email transactions talking about the very deal, and they could produce those email transactions. That's a significant portion of what's missing.

But anyway, that -- Your Honor, I think I said my piece.

THE COURT: Okay, thank you. I see some other parties' lawyers rising.

CHRISTOPHER HARRIS: Your Honor, Chris Harris of Latham for the ABN AMRO defendants; we were formerly known

as Fortis, and I rise just to address some factual issues that came up.

Just to be clear, the Trustee already requested all of the categories of documents that they are now requesting from us again. We pointed that out in our briefing and they don't dispute that.

THE COURT: Well, I think part of the argument is they may have requested it from one affiliate, but not necessarily the defendant.

MR. HARRIS: That's right, Your Honor. But just to make sure it's clear, we produced from the entity they requested. It's not like they were discovery disputes that they avoided bringing to Your Honor's attention. They told us which entity they want it collected from. They told us which funds they thought were relevant, and we gave them everything.

THE COURT: Did the definition of you include affiliates in the documents?

MR. HARRIS: The definition included affiliates. And then we had a meet and confer, and we agreed that it would only be from the entity that they subpoenaed. And if they -- the idea there's been some change that justifies bringing in new entities, it doesn't make any sense because they had Rule 2004 power up until the day they filed their Complaint.

They clearly had a draft of it before and knew who they would be suing, and they chose not to exercise that power at the time. Instead, they asked for the exact documents they're asking for now, which shows that they were indeed relevant to their inquiry notice standard or they wouldn't have asked for it.

THE COURT: That reminds -- you reminded me of something. I don't know if it was you or one of the defendants had a chart which compared the present requests with prior requests.

MR. HARRIS: That was us, yes.

THE COURT: Yeah, that would be helpful if I had that from the other defendants. It just makes it easier to compare rather than flipping back and forth between the present requests and prior requests.

All right, thank you. Next.

MR. BOCCUZZI: So, Your Honor, we should submit a chart to Your Honor?

THE COURT: Yeah, I would appreciate that from the defendants. It's just easier to compare because one of your key arguments is that they asked for this stuff already. Yes, sir.

MR. FELBERG: Your Honor, Michael Felberg from Allen & Overy for the Royal Bank of Scotland. I'd just like to make one point.

THE COURT: How's you appeals going to the District Court going?

MR. FELBERG: Not so well, Your Honor.

THE COURT: Okay.

MR. FELBERG: But on another subject --

THE COURT: Yes, sir.

MR. FELBERG: There's a point that may be unique to our client here. And that is that the Trustee has already amended his Complaint. And the timing of that amendment is interesting because it occurred in 2012.

And while there is a dispute among the parties as to whether there's really been a change in the law, there is no dispute that by the time the Trustee amended his Complaint against us in 2012, the standard articulated in cases in the Madoff bankruptcy was -- had switched from inquiry notice to subjective knowledge, subjective willful blindness.

And, in fact, at Page 33 of the amended Complaint in our case, the Trustee changed the title of the section of the heading of the Complaint. From the initial version, ABN was on inquiry notice to, in the new version, ABN RBS had knowledge of indicia of fraud at (indiscernible).

So whatever changes in law either did or did not occur, by the time the Trustee amended its Complaint against us, the change had occurred, at least the law was what we

now know it to be. And they took their shot and we're eager to have a chance to move against that Complaint. Thank you.

THE COURT: Were there any other amended complaints after 2012 that are involved in this particular proceeding?

MS. GRIFFIN: I think we amended in Fortis, and if I may talk to that a little bit, Your Honor. I'm sorry.

MR. BOCCUZZI: Just to give a number, we think there are at least nine transferee defendants against whom it was amended in 2012, so after the --

THE COURT: Initial transferee or subsequent transferee? It doesn't necessarily matter.

MR. SUSHON: Your Honor, Bill Sushon from O'Melveny & Myers for Mistral and Zephyros. My clients were not sued in the first instance until April 2012.

THE COURT: Did you extend the statute of limitations?

MR. SUSHON: I don't recall at this point. I'm sorry, Your Honor, but we were not sued until April 2012, as we say. Thank you.

THE COURT: Which defendant was that?

MR. SUSHON: Mistral and Zephyros, Your Honor.

MR. SIMON: Your Honor, may I speak to Mistral and Zephyros?

THE COURT: Sure.

MR. SIMON: Howard Simon from Windels Marx. We filed those subsequent transfer complaints in mid-2012. And I think if anything, those subsequent transfer complaints show the reason why this request for relief is -- there is just cause for it.

In 2012, as to subsequent transfers, and I'm focusing on that because that's all our complaints. We filed -- Windels filed four complaints; they're all subsequent transfer complaints. The state of the law and the practice of trustees, for as long as I was practicing, was that when it comes to a subsequent transferee, you allege the ABCs of the transfer: who got the transfer; when did they get it; and how much?

And that's what was a typical subsequent transfer complaint because there was no law that said -- leaving aside initial transferees, there was no law that said a subsequent transferee -- that a Trustee pleading a subsequent transferee case had a burden of anything.

THE COURT: But the knowledge of the subsequent transferee was always an -- is always an issue in the case and good faith.

MR. SIMON: Yes, the knowledge is always an issue because under the recovery statute, you need to -- you're going to battle that issue. But it was never one that a Trustee felt the need to get out in front during 2004 and

find out the information so you could plead that.

Now, you wanted to be satisfied that ultimately you could show it. And in our four subsequent transfer cases, I can tell Your Honor that, although we pleaded bare bones complaints. We were very confident that under any standard, we could satisfy it because these are big financial companies who put -- there's Google searches, there's newspapers, there's a lot of ways to show that these companies were in a position to know. Obviously, easier under an objective standard.

And it wasn't until 2014, not only did the burden change as to subsequent transferees, but that's the first time a judge said you needed subjective knowledge as to the subsequent transferee. So that was a total game changer in 2014. And any argument that by 2012, a Trustee suing any transferee, but particularly a subsequent transferee, should have known that he was going to be faced with that new pleading burden just doesn't make sense.

THE COURT: Knew or should have known?

MR. SIMON: Knew or should have known. I'll go with should have known. So, Your Honor, I think the point Miss Griffin was making is highlighted by these subsequent transferred cases. Because whatever discovery requests Trustee's counsel sent out, if the response came back inadequate, as was the case most of the time -- although

Mistral and Zephyros, I don't even believe there was a 2004 request made because it wasn't necessary.

But if the Trust came -- the Trustee's request came back and it was an inadequate response, and most of them were inadequate because that's generally the way the game was played, there was no need for the Trustee to press the issue and start making motions to compel and having discovery conferences because you just didn't need the information.

THE COURT: So why didn't you ask for it in the first place?

MR. SIMON: Because you ask for the information, you put out a request, and you hope to get back information. But so what we're saying, Your Honor, is that merits discovery is not barred. There are cases in which Miss Griffin has mentioned which it is discovery going towards the merits has been allowed. It may be preliminary injunction cases.

What we're saying though is that under the standard, the 26(d) standard, there's no limitation as to what kind of situations constitutes good cause. And what we're saying is that where a Trustee, unlike other plaintiffs, has a 2004 discovery tool, when that discovery tool is in a sense taken away somewhat because of timing -- purely timing -- that that constitutes good cause for a

limited discovery before filing a complaint because a Trustee does have that right that other plaintiffs don't.

And I think all of that put together, I think is the reason we think that our argument makes sense, it's practical, and is not contrary to the law.

THE COURT: Thank you. Yes, sir.

MR. GINSBERG: Bruce Ginsberg, Davis & Gilbert, for Natixis Financial Products, one of the defendants who responded to Rule 2004 discovery, just responding to the respective questions that Your Honor asked.

First, the subpoena was directed to this defendant, Natixis Financial Products LLC. We expressly answered on that party's behalf, as well as its U.S. parent and all subsidiaries of the U.S. parent.

Second, we are a defendant who did submit a chart comparing the requests that we responded to, to those that are at issue now. And our chart is an appendix is attached to our supplemental brief. Our adversary proceeding is 10-05353, and that brief is Docket 146.

Third, we didn't respond to just one 2004 discovery submission, or demand rather. In 2009, we responded to a Rule 2004 document subpoena. A full year later after those documents had been produced, the Trustee came back with a second Rule 2004 subpoena; we responded to that. And after those documents were produced, the Trustee

took a Rule 2004 deposition.

In their papers, they say they took a deposition of an employee. It just wasn't any employee; it was the employee who was the head of the group that designed the financial products at issue; it was the employee who did the due diligence; and it was the employee who did the monitoring of the feeder funds after the hedging funds were purchased.

In the course of that deposition, which lasted a full day, the Trustee inquired into diligence, indicia of fraud, reactions to indicia of fraud, and into knowledge. Thank you.

THE COURT: I reserve decision. Thank you very much. So you don't want to amend your complaints, right?

MS. GRIFFIN: Pardon?

THE COURT: You don't want to amend your complaints.

MS. GRIFFIN: I absolutely do, Your Honor, after you incorporate -- decide the motion in our favor.

(Whereupon these proceedings were concluded at 2:47 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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